

**United States Department of Labor
Employees' Compensation Appeals Board**

J.M., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
CORRECTIONAL INSTITUTION,
Ashland, KY, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 21-0071
Issued: August 27, 2021**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 22, 2020 appellant, through counsel, filed a timely appeal from a September 8, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the September 8, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective May 24, 2020, as he no longer had disability causally related to the accepted February 24, 2016 employment injury; and (2) whether appellant has met his burden of proof to establish continuing residuals or disability causally related to his accepted February 24, 2016 employment injury on or after May 24, 2020.

FACTUAL HISTORY

On February 25, 2016 appellant, then a 54-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that, on February 24, 2016, he sustained a right knee injury when he was assaulted by an inmate which developed into an altercation then a chase while in the performance of duty. OWCP accepted the claim for complex tear of right medial meniscus and right knee effusion.⁴ Appellant stopped work on February 24, 2016 and returned to work on May 20, 2016 in a light-duty position. On September 13, 2016 the employing establishment advised that it could no longer accommodate appellant with a limited-duty assignment as of September 10, 2016. OWCP paid appellant wage-loss compensation on the supplemental rolls as of September 13, 2016 and on the periodic rolls as of June 25, 2017. On September 3, 2019 it expanded acceptance of the claim to include temporary aggravation of right knee osteoarthritis. Appellant underwent an OWCP-authorized right total knee arthroplasty on September 9, 2019, which was performed by Dr. Felix Cheung, a Board-certified orthopedic surgeon.

On September 17, 2019 appellant was seen at an emergency department by Dr. Kevin Franks, an osteopathic physician specializing in emergency medicine for the recent onset of right knee pain following his total knee replacement surgery. He diagnosed knee pain. In a September 17, 2019 consultation note, Dr. William Fravel, Board-certified in family medicine, related that appellant's clinical examination and laboratory findings were consistent with normal postoperative changes following a right total knee arthroplasty without any current clinical concern for infectious etiology or blood clot on his workup. Appellant continued under Dr. Cheung's care for post right total knee arthroplasty and he underwent physical therapy.

In an October 23, 2019 report, Dr. Cheung reported that appellant's range of motion of the right knee was "acceptable, but not great." He noted that there was no evidence of infection and appellant's right knee x-rays taken that day revealed a well-fixed, press-fit, cruciate stabilizing right knee total knee replacement in excellent position without evidence of failure.

In December 6, 2019 and January 17, 2020 reports, Dr. Cheung indicated that appellant's right knee x-rays taken that day indicated that the right total knee replacement remained in excellent position without evidence of failure.

In a February 19, 2020 report, Dr. Cheung noted that since appellant's total knee replacement surgery, he had pain globally in the knee and an area of tenderness over the medial femoral condyle. Dr. Cheung provided an assessment of painful right total knee replacement. He

⁴ Appellant has prior claims involving the right lower extremity. Under OWCP File No. xxxxxx455, OWCP accepted that appellant sustained a right knee sprain on February 14, 2003. Appellant underwent surgery on April 15, 2003 for a right medial meniscus tear. Under OWCP File No. xxxxxx339, OWCP accepted an April 1, 2011 sprain of other specified sites, right knee and leg.

indicated that appellant was stable despite some mid flexion instability and stiffness both in flexion and extension and point tenderness over the medial femoral condyle. Dr. Cheung recommended that appellant wear a knee brace to help improve stability and to determine if his knee would “scar down.”

In a February 24, 2020 attending physician’s report (Form CA-20), Dr. Cheung checked a box marked “Yes” indicating that appellant was able to resume regular full-duty work with no restrictions as of December 2, 2019. He further noted that appellant was advised of his work status on December 2, 2019.

In a March 20, 2020 letter, OWCP, relying on Dr. Cheung’s February 24, 2020 Form CA-20, notified appellant that it proposed to terminate his wage-loss compensation as the weight of the evidence from Dr. Cheung established that he was no longer disabled from work as a result of the February 24, 2016 employment injury. It afforded him 30 days to submit additional evidence or argument.

In a letter dated April 20, 2020, which OWCP received on April 22, 2020, appellant’s counsel requested an extension of time to respond to the notice of proposed termination. He indicated that appellant had been unable to see his physician as the physician’s office was closed due to the “shut down.”

By decision dated April 22, 2020, OWCP terminated appellant’s wage-loss compensation, effective May 24, 2020. It found that the weight of the evidence was represented by Dr. Cheung in his February 24, 2020 Form CA-20 report. OWCP noted that no additional argument or additional evidence had been received.

On May 1, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review, which was held telephonically on August 3, 2020.

In a May 20, 2020 Form CA-20, Dr. Cheung opined that appellant had been totally disabled from September 19, 2019 onward. In his attached May 20, 2019 report, he indicated that he performed appellant’s right total knee replacement in September 2019 and that appellant always had some pain and swelling in the knee post-surgery. Dr. Cheung noted that he had tried to send appellant back to work in December, but appellant was upset because he believed that he could not perform his date-of-injury job duties and there was no light-duty work available. He reported appellant’s physical examination findings, noting that the right knee wound had no evidence of infection, but mild swelling, range of motion to 130 degrees, mid flexion instability and an antalgic gait. Dr. Cheung reported that May 2, 2020 x-rays demonstrated a well-fixed press-fit, cruciate substituting right total knee replacement in excellent position without evidence of failure. He outlined appellant’s medical course regarding appellant’s painful right total knee replacement and opined that a revision surgery may give appellant a little more stability. Dr. Cheung indicated that he liked to wait a year from the time of the total knee replacement surgery to see if there was any improvement. He noted his agreement that appellant could not return to work based on the job description appellant provided. Dr. Cheung provided work restrictions, which he indicated were presented by appellant, so that appellant would not be a danger to himself or his coworkers while he performed his job duties. He indicated that he would see appellant in about three months’ time to determine whether revision surgery should be scheduled.

On June 10, 2020 OWCP referred appellant along with a statement of accepted facts (SOAF) to its District Medical Adviser (DMA) regarding the medical necessity of proposed revision total knee arthroplasty. In a July 2, 2020 report, Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as the DMA, agreed with Dr. Cheung that the proposed revision total knee arthroplasty was causally related and medically necessary. He indicated that the medical record documented that appellant has mid flexion instability, which caused symptoms and which prevented his return to work. The DMA noted that, while there is no sign of infection, if appellant continued to have instability, he would never be able to return to work. He also noted that the proposed revision surgery was the standard of care for the diagnosed problem given appellant's mid flexion instability. Based on the DMA's July 2, 2020 report, OWCP authorized a right revision total knee arthroplasty.

In a July 29, 2020 report, Dr. Cheung reiterated that appellant had some right knee mid flexion stability and mechanical issues. He noted that appellant's right knee symptoms had improved with a knee brace. Dr. Cheung noted that appellant was tentatively scheduled for revision surgery in September, because he liked to wait at least a year following surgery to see whether further improvement would occur.

By decision dated September 8, 2020, an OWCP hearing representative affirmed OWCP's April 22, 2020 termination decision. The hearing representative found that appellant's treating physician had indicated that he could return to light and full duty.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁵ OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective May 24, 2020.

In terminating appellant's wage-loss compensation benefits effective May 24, 2020, OWCP found that the weight of the evidence was represented by Dr. Cheung's February 24, 2020 Form CA-20 report. In that report, Dr. Cheung checked a box marked "Yes" indicating that appellant was able to resume regular full-duty work with no restrictions as of December 2, 2019.

⁵ See *S.H.*, Docket No. 19-1855 (issued March 10, 2021); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *G.T.*, Docket No. 18-01302 (issued October 22, 2019); *A.G.*, Docket No. 18-0749 (issued November 7, 2018); see *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ See *T.M.*, Docket No. 19-1068 (issued March 30, 2021); *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284 (1988).

However, the Board notes that Dr. Cheung, in his February 19, 2020 report which was contemporaneous to his February 24, 2020 Form CA-20 report, provided an assessment of painful right total knee replacement. He indicated that appellant had some right knee mid flexion instability and stiffness both in flexion and extension and point tenderness over the medial femoral condyle, and he recommended that appellant wear a knee brace to help improve stability and that he would see him back in about three months to see how things were going. These reports, which are five days apart, demonstrate an inconsistent opinion on appellant's ability to return to work. Because OWCP relied on Dr. Cheung's inconsistent opinions, OWCP failed to meet its burden of proof in terminating appellant's wage-loss compensation benefits effective May 24, 2020.⁸

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective May 24, 2020, as he no longer had disability causally related to the accepted February 24, 2016 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 27, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

⁸ In light of the Board's finding with regard to Issue 1, Issue 2 is moot.